Supreme Court, U.S.
FILED
DEC 13 2001
THE CLERK

Nos. 00-1751, 00-1777, and 00-1779

In The

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL.,

Petitioners,

v.

DORIS SIMMONS-HARRIS, ET AL.,

Respondents.

And Related Cases

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR CALIFORNIA ALLIANCE FOR PUBLIC SCHOOLS AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE CALIFORNIA ALLIANCE FOR PUBLIC SCHOOLS[1]

The California Alliance for Public Schools ("CAPS") is a coalition of individuals and community groups that came together after the defeat of Proposition 38, a school voucher initiative that appeared on the November, 2000 California ballot. More than 70% of the California electorate voted against the measure, an even larger number than the 69.5% that voted against an earlier voucher initiative that appeared on the November, 1993 ballot.

Following the defeat of Proposition 38, CAPS began its efforts to promote and protect California's public schools. With its web site, www.ourpublicschools.org, and its Internet newsletter, CAPS provides news and research to the California educational community and to all those who have an interest in protecting and improving California's public schools. CAPS also conducted a statewide poll of voters in April, 2001 to reconfirm California's strong rejection of vouchers. The poll, conducted by the Mellman Group, found that a solid 59% would reject a $4,000 voucher to help pay for the costs of private school for every student in California.

CAPS' member organizations represent hundreds of thousands of voters, parents, teachers, school board members, administrators and other school employees, firefighters, unions and civil servants, all of whom have a vital interest in California's schools. Each of the following

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[1] The parties have consented to the filing of this brief, and letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

organizations, which are listed in alphabetical order, is a member of CAPS:

American Association of University Women
Americans United for the Separation of Church & State
Anti-Defamation League
Association of California School Administrators
Association of California Urban School Districts
Bay Area Urban League
California Association of School Business Officials
California County Superintendents Educational Services Association
California Federation of Teachers
California Latino School Board Member Association
California Legislative Council for Older Americans
California National Organization for Women
California Professional Firefighters
California School Boards Association
California School Employees Association
California School Nurses Organization
California Speech-Language-Hearing Association
California State Employees Association
California State Firefighters Association
California State Parent Teacher Association
California State Pipe Trades Council
California Teachers Association
Children's Advocacy Institute
Chinese Progressive Association
Coalition for Adequate School Housing
Congress of California Seniors
Delta Kappa Gamma
Frente Indigena Oaxaqueno Binacional
League of Women Voters of California
National Council of Jewish Women – California

National Council of Jewish Women – Los Angeles
Parents of Watts Working With Youths and Adults
People for the American Way
Service Employees International Union, California State Conference

CAPS and its members believe that vouchers are harmful not only to the public schools but to the general polity as well. As Justice Brennan observed in *School Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963):

> It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions.
>
> *Id.* at 241-42 (Brennan, J., concurring).

A voucher system that diverts government funds to pay for religious instruction not only weakens our schools' ability to perform their "uniquely public function;" it strikes at the heart of the separation of church and state that the Establishment Clause was designed to protect. As the accompanying brief demonstrates, more than 78% of the nation's private elementary and secondary schools are religious. Because they have parish or denominational support, religious schools can offer a private education more cheaply than their secular counterparts. In light of these facts, school voucher plans inevitably steer voucher recipients toward religious schools, in violation of the Establishment Clause and to

the clear detriment of the public schools that CAPS was formed to defend.

SUMMARY OF ARGUMENT

Just as Henry Ford's customers could have any color car they wanted provided it was black, school voucher recipients in Cleveland can theoretically send their children to any private school they want, but the school will almost always be religious. Because private schools in Cleveland are overwhelmingly religious, voucher participants have no real choice. Their only viable alternative is a religious school.

The Cleveland voucher program is not unique in its religious effect. Religious schools dominate the nation's private schools, and they almost always cost less than secular private schools. Even if voucher systems were to become widespread, the private school market is unlikely to change. Because education is labor intensive and requires extensive facilities, religious schools with denominational or parish support will always have an advantage over secular schools that must hire teachers at market rates and provide their own facilities and equipment.

In 1993 and again in 2000, the voters of California confronted these realities when they rejected statewide initiatives that would have made vouchers available to all of the State's 6 million schoolchildren. In California, as in other states, the private school population has stayed at approximately 10% of the public school population for many years. Of that 10%, the vast majority of students are in religious schools. More importantly for vouchers, the relatively few available seats in private schools are far

more likely to be found in religious schools than in secular institutions.

Californians understood that if the voucher initiatives passed, their tax dollars would be used to fund religious schools. They also understood that the initiatives prohibited even the most rudimentary fiscal or educational accountability. Whether or not they recognized the constitutional compulsion behind the prohibition, they knew that these measures would funnel vast amounts of public money to pay for religious instruction over which the State could exercise no control. They defeated each measure by votes of more than two to one.

The 1993 initiative prompted policymakers to ask what a voucher could buy and what types of schools would be most likely to participate in a voucher program. This brief will discuss the fruits of that and other research, which demonstrates that nationwide, school voucher programs will inevitably steer schoolchildren into religious institutions. The result is government support and endorsement of religious instruction, in violation of the First Amendment.

I. UNRESTRICTED AID TO RELIGIOUS SCHOOLS INEVITABLY RESULTS IN GOVERNMENTAL INDOCTRINATION

A. Private Choice Is Only One Element in Determining Whether a Program Advances Religion

The Establishment Clause prohibits a state from enacting laws that have the primary purpose or effect of advancing religion. In *Agostini v. Felton*, 521 U.S. 203, 234 (1997), this Court identified three criteria for determining whether a statute has the effect of advancing religion:

whether the statute results in governmental indoctrination, defines its recipients by reference to religion, or creates an excessive entanglement between church and state. Because no party has claimed that the Ohio program defines its recipients by reference to religion or creates an excessive entanglement, this case turns on the issue of governmental indoctrination.

This Court has said that "the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000). One factor critical to, but not dispositive of, the endorsement issue is whether the aid flows directly to the religious institution or whether it goes instead to a private individual who then makes the choice of where to put the aid to use. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 12 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986).

This Court's decisions describe a continuum with direct governmental subsidies at one end and a government employee's donation of part of his paycheck to a religious institution at the other. *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 226; *Witters*, 474 U.S. at 486-87. In each case, the ultimate source of the funds is the government, but the character of the transaction changes dramatically because of two intervening variables. The first variable is the identity of the decisionmaker: Does the government decide to send aid to the religious institution or does the aid flow because of the "genuinely independent and private choices" of individuals? *Id.* at 488.

The second variable is who owns the funds. In the case of the government employee's donation, the funds have ceased to belong to the government. They are the employee's funds, because he has earned them. The decision to donate part of his funds to a religious institution is entirely his; it cannot be attributed to the government because both the funds and the choice to donate them belong to the individual.

The more limitations there are on the use of the funds, however, the more clearly the funds belong to, and come from, the government. Where the funds are issued as part of a government program, to be used to pay for services that the government would otherwise supply directly and only for those services, they retain far more of their character as government funds. Because it is the government that decides how the money can be used and for what, ownership of the funds more truly resides with the government than with the individual. When funds like these flow to religious institutions, they are much more likely to be viewed as a government endorsement of religion.

Government voucher programs may fall in many places along this continuum, depending on what they are for and how they are run. Food stamps are a good example of a government voucher program that poses no threat of government endorsement of much of anything. Food stamps are unlikely to be used at religious institutions, and even if they are used to buy bread for a private communion service, no one is likely to attribute that choice to the government. Conversely, if they are spent at a bakery run by a religious group or a kosher deli, the commercial transaction for which they are used is not likely to be infused with religious meaning for either

side. Most importantly, there is a true consumer's marketplace in which the food stamps can be used, and although there are restrictions on the type of goods that can be purchased with the stamps, those restrictions do not loom so large that they amount to a government endorsement of any one brand or type of food.

School vouchers are quite another thing. Unlike food stamps, school vouchers are used to buy not goods, but services. These services not only involve speech, but speech directed at the youngest and most impressionable members of our society who are there to be taught and molded by the very speech for which the government is paying.[2] Moreover, the teaching function performed by the speakers is one normally performed by the government and which the government recognizes is so essential to the maintenance of a free society that a child's exposure to it, whether in a public school or private, is compulsory in every state.

This Court has long recognized the importance of education to a free society. Its most famous discussion of the subject appeared in *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), where the Court wrote:

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[2] *See* Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243-260, at 258 (1996). Dean Sullivan argues that "government long has been involved in the inculcation of values in schools" and "[p]arochial school teachers, if funded by the state, inevitably mingle the state's value inculcation . . . with a religious value system and set of beliefs." *Ibid.* She concludes that "[t]he inevitable mingling of these two messages impermissibly implicates the state in the religious message." *Ibid.*

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

For at least the last century, this function has been performed primarily by the nation's public schools, a responsibility which this Court has described as ranking "at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Thus, while the Free Exercise Clause requires that parents be allowed to send their children to religious schools,[3] the state's interest in, and its identification with, the issue of education is undisputable.

That the state's educational interests also include inculcation of civic values is equally indisputable:

> The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions. . . . These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic

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[3] *Id.* at 213-14; *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

> political system have been confirmed by the observations of social scientists. [Citations].
>
> *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979) (citations omitted).

Likewise, this Court has long recognized the importance of teachers in molding the minds of their students:

> [A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. [Footnote.] This influence is crucial to the continued good health of a democracy.
>
> *Id.* at 78-79 (footnote omitted).

Thus, the identification of the state with the educational function and its interest in the values that are communicated through the schools makes it far more likely that government payments for religious instruction will appear to any rational observer to be government endorsement of religion.

B. School Voucher Programs Are Different From Other Forms of Government Aid

Because the stakes are so high and schools are so different from food stamps, the constitutionality of school vouchers must turn on more than whether a child's parents choose to enroll her in a religious private school rather than a secular public one. Other factors must be considered, and that is precisely what this Court has done in its recent school aid cases. With respect to the deaf child's interpreter in *Zobrest v. Catalina Foothills*

School District, for example, the Court noted that "no funds traceable to the government ever find their way into sectarian schools' coffers," because the school district paid the interpreter directly. 509 U.S. 1, 10 & n.11 (1993). It was also important that the religious school "is not relieved of an expense that it otherwise would have assumed in educating its students." *Id.* at 12. Most importantly, the Court noted that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor." *Id.* at 13. The interpreter is a conduit for the teaching, not the teacher herself. *Agostini v. Felton*, 521 U.S. 203, 204 (1997) ("Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place. . . . ") (emphasis in original).

Similarly, in *Agostini*, the Court emphasized that "[n]o Title I funds ever reach[ed] the coffers of religious schools"; the funds did not relieve schools of costs they would otherwise have; nor was there any reason to believe that the public employees posted at religious schools would violate rules and "embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures." 521 U.S. at 226, 228.

None of these distinctions marks the voucher program at issue here. Public funds not only reach the coffers of religious schools, they flow directly there. Ohio Rev. Code Ann. § 3313.979 (Anderson 1999 & Supp. 2000). That the checks are made out to the parent or guardian who must sign them over to the school is a distinction without a difference. The money never loses its character

as government funds, and it is sent directly to the school itself. The aid undeniably relieves the school of costs that it would otherwise have had in educating its voucher students, and it undeniably is used to pay for the inculcation of religion.

These factors necessarily affect both the importance of asking whether government aid reaches religious institutions as the result of the "genuinely independent and private choices of individuals," and how that question is framed. Petitioners and their amici argue that the choice question is the only one worth asking and that the universe of choices from which voucher parents can choose must be viewed broadly enough to include the public schools or at least Cleveland's public magnet and community schools.[4] To return to the food stamp analogy, this would be a little like saying that it would be constitutional for a city to tell welfare recipients that they could take their meals at a government commissary or use their food stamps only at soup kitchens, even though the government knew that 90% of the city's soup kitchens were religious and that they required recipients to sit through a religious service in order to get a bowl of soup. With the school voucher, however, the risk of government endorsement of religion is even worse, because the recipient is a child who will spend a large part of the day being given religious instruction at government expense.[5]

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[4] *See, e.g.*, Brief on the Merits of State Petitioners at 8-10; Brief on the Merits for the Hanna Perkins School, et al. Petitioners at 20-21, 34; Taylor, et al. Petitioners' Brief on the Merits at 40-42 and Table 1; Brief on the Merits for the United States as Amicus Curiae at 15-17.

[5] The difference between schoolchildren and adults is a critical difference between this case and the use of government funds to pay for such things as college tuition under the G.I. Bill or the blind student's theological education approved in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). College students are far less impressionable than elementary and high school students, and their decision to undertake secondary education is itself voluntary, as opposed to the compulsory education required of younger students. *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 252 (1963). Even in *Witters*, the aid was paid directly to the student, and the Court noted that the "full benefits of the program" were not "limited, in large part or in whole, to students at sectarian institutions." *Witters*, 474 U.S. at 488. The opposite is true here.

Where a government program displays these characteristics – aid that is used to purchase instruction that would otherwise have been provided by the government and that is required by the government, money that flows directly to the religious institution, that relieves the institution of costs that it would otherwise have to educate certain of its students, and that is used without restriction for the religious instruction of the young – the issue of private choice as an indicator of government endorsement must focus on the choices available to the program participants, not the public at large. If the choices available to program participants are overwhelmingly religious, to the point where those who would partake of the program know that they must also partake of religion, then the inevitable effect is government endorsement and advancement of religion.

As the discussion that follows demonstrates, this is the case with school vouchers. There simply are not enough seats at secular private schools, either in Cleveland or nationwide, to make nonsectarian education a realistic option for voucher recipients. The result is that

voucher programs create a clear "financial incentive for students to undertake sectarian education" in violation of the Establishment Clause.[6]

II. VOUCHER PROGRAMS INEVITABLY STEER SCHOOL CHILDREN INTO RELIGIOUS INSTITUTIONS

A. Religious Schools Dominate the Private School Market

It is undisputed that during the 1999-2000 school year, 96% of Cleveland's voucher recipients were enrolled in religiously affiliated schools and that such schools made up 82% of the schools that participate in the Cleveland voucher program. *Simmons-Harris v. Zelman*, 234 F.3d 945, 949 (6th Cir. 2000) (Zelman Pet. App. at 5a); Brief on the Merits of State Petitioners at 7; Brief on the Merits for the United States as Amicus Curiae at 4.

These numbers suggest, but do not demonstrate, that the secular choices available to voucher participants are in fact limited. In order to determine the true extent of those choices, however, one must look beyond merely the number of secular schools that participate in the program; one must look at their size as well. Accurate data on available spaces are difficult to obtain, but enrollment data are available and can serve as an indicator of the number of available spaces. Those data demonstrate that religious schools dominate not only existing voucher programs, but the private educational marketplace nationwide.

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[6] *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. at 487.

1. Religious schools dominate voucher programs nationwide

The ten secular schools that participated in the Cleveland voucher program in 1999-2000 admitted a total of 129 voucher enrollees. Declaration of Alice O'Brien, Exh. E (J.A. 285a-286a). Even if *all* of the secular private schools in Cleveland were to participate in the program, there would be room for fewer than 500 additional students. The National Center for Education Statistics[7] lists only 12 secular K-8 private schools in Cleveland, with a total enrollment of 889[8]. However, some of these seats are for pre-schoolers, and the total secular K-8 private school enrollment, excluding pre-kindergarten children, in Cleveland is only 510 students. *Ibid.* By contrast, in 1999-2000 the Cleveland voucher program paid for 3,632 students to attend religious schools. Zelman Pet. App. at 5a.

Cleveland's program is not an aberration. Every other voucher program, whether funded publicly or privately, displays the same characteristics. The oldest publicly funded voucher program is in Milwaukee, Wisconsin. The Wisconsin Legislature created the Milwaukee program in 1989; the program began in 1990-91

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[7] The statistics that follow come primarily from the National Center for Education Statistics ("NCES"), an agency within the United States Department of Education that is the main federal organization responsible for collecting and analyzing data on education. Other sources include state departments of education and studies conducted under the auspices of the Program on Education Policy and Governance at Harvard University.

[8] NCES' database, The Private School Locator 1999-2000, is available at http://nces.ed.gov/surveys/pss/locator/locator.asp.

by funding 341 pupils in seven secular schools.[9] After the Wisconsin Supreme Court upheld inclusion of religious schools in 1998,[10] participation in the program more than tripled, an increase that the Wisconsin Legislative Audit Bureau described as "largely because of religious schools' participation in the program." *Milwaukee Evaluation* at 13. In the 1999-2000 school year, the program included 7,996 pupils in 91 different schools. *Id.* at 11.

Just as in Cleveland, the Milwaukee program is now dominated by religious schools. Of the 86 schools that participated in the program in 1998-99, only 23 (26.7%) were secular and 63 (73.3%) were religious. *Milwaukee Evaluation* at 15. Religious schools served 69.9% of the students in the program, and secular schools served 30.1%. *Ibid.*

The same pattern is repeated in other states or cities that have established voucher programs. Florida's program is only two years old and extremely small. Students are eligible if they are enrolled in or assigned to a public school that the State has designated as failing for any two years in a four-year period. Fla. Stat. § 229.0537 (2001). Only two schools were designated as failing during the

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[9] Wis. Legislative Audit Bureau, *An Evaluation: Milwaukee Parental Choice Program*, at 11 (Feb. 2000), available at http://www.legis.state.wi.us/lab/reports/00-2full.pdf [hereinafter *Milwaukee Evaluation*].

[10] *Jackson v. Benson*, 218 Wis. 2d 835 (1998), *cert. denied*, 525 U.S. 997 (1998).

initial year of the program, and no new schools were added in 2000-2001.[11] There were 57 students in the program in 1999-2000. *Ibid.* Although the Florida Department of Education does not identify schools as religious or secular, of the five schools listed on the program's web site as approved to participate, four have names that identify them as religious schools.[12]

In addition to the Cleveland, Milwaukee, and Florida programs, private philanthropical organizations have established voucher programs in several other cities. The largest of the private philanthropic programs is the Children's Scholarship Fund, which awarded 40,000 scholarships in 1999 to children in low to moderate income families throughout the country.[13] Fully 92% of these scholarships were used at religious schools. *Id.* at 5. Evaluations of the Children's Scholarship Fund-affiliated programs in Washington D.C., and Dayton, Ohio reported similar results, with 91% of the Washington scholarships

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[11] *See* "Opportunity Scholarship Program, Parent Information" on Fla. Dep't of Educ. web site, a document available at http://www.opportunityschools.org/osas/osp/info.html.

[12] The schools are Saint John The Evangelist, Little Flower Catholic, Sacred Heart Cathedral School and Saint Michael School. The fifth, and presumably secular, school is called Montessori School. *See* "Opportunity Scholarship Program, Private School Information, Participating Private Schools" on Fla. Dep't of Educ. web site, a document available at http://www.opportunityschools.org/doeosas/owa/privatebycounty.

[13] Paul E. Peterson & David E. Campbell, Harvard Univ. Program on Educ. Policy & Governance (PEPG), *An Evaluation of the Children's Scholarship Fund*, at 1 (May 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

going to religious schools and 92% in Dayton.[14] More than 91% of the vouchers issued in a similar privately funded program in San Antonio, Texas went to religious schools.[15] The number was 85% for a privately funded program in the San Francisco Bay Area.[16]

2. Religious schools dominate the private school market in the United States

The National Center for Education Statistics publishes a biennial survey of private schools in the 50 states and the District of Columbia, conducted by the U.S. Bureau of the Census. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Private School Universe Survey: 1999-2000*, at 1 (Aug. 2001). In the fall of 1999, there were 27,223 private elementary and secondary schools in the United States, 78.4% of which were religious. *Id.* at 5 (Table 1).

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[14] Patrick J. Wolf, Paul E. Peterson & Martin R. West, Harvard Univ. PEPG, *Results of a School Voucher Experiment: The Case of Washington, D.C. After Two Years*, at 9 (Aug. 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm; Martin R. West, Paul E. Peterson & David E. Campbell, Harvard Univ. PEPG, *School Choice in Dayton, Ohio After Two Years: An Evaluation of the Parents Advancing Choice in Education Scholarship Program*, at 3 (Aug. 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

[15] Jay P. Greene & Daryl Hall, Mathematica Policy Research, Inc., *The CEO Horizon Scholarship Program: A Case Study of School Vouchers in the Edgewood Independent School District, San Antonio, Texas*, at 7 (May 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

[16] Paul E. Peterson, David E. Campbell & Martin R. West, Harvard Univ. PEPG, *An Evaluation of the BASIC Fund Scholarship Program in the San Francisco Bay Area, California*, at 15 (Jan. 2001), available at http://www.ksg.harvard.edu/pepg/papers.htm.

The remaining 21.6% nonsectarian schools included regular schools (9.2%), special emphasis schools such as those that focus on science and math or the performing arts[17] (7.8%), and special education (4.6%). *Ibid.*

Enrollment figures reveal an even stronger predominance of religious education. Of the 5,162,684 students who attended private schools in the United States in 1999, more than 84% of them (4,354,621 students) attended religious schools. *Ibid.* When one subtracts the 86,274 special education students who attended nonsectarian schools, there were only 721,789 students (14%) who attended nonsectarian regular or special emphasis private schools in the United States. The numbers are particularly striking at the elementary school level, where educational foundations are laid and where students are most impressionable.[18] In grades two through six, the percentage of private school students who attend nonsectarian schools hovers around 12%; it is only 11.3% for those who are in the fourth grade. *Id.* at 14 (Table 10).

As might be expected, private schools are more numerous in urban areas than in rural, with only 22.2% of the nation's private schools located in rural areas or in small towns. *Id.* at 7 (Table 3). Even in urban areas, however, religious schools predominate. Students enrolled in private nonsectarian schools account for only 14.8% of the private school enrollment in the inner city and 15.3% of the private school enrollment in what NCES

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[17] *Id.* at 30.

[18] *See, e.g.*, Martin E. Marty, *Education, Religion, and the Common Good*, 43-44 (2000) ("In elementary schools especially, where students often have a single teacher for most subjects, children may be more gullible, more easily influenced and manipulated, more exploitable.").

calls "urban fringe/large town." The remainder of the urban private school population is in religious schools. *Id.* at 23 (Table 19).

B. Research Demonstrates That Voucher Parents Have Little or No Choice Between Religious and Secular Schools

Recent studies demonstrate that the high number of vouchers used at religious schools is driven far more by scarcity and cost than true parental choice. Of the representative sample of parents who were offered vouchers by the Children's Scholarship Fund, only 9.5% said that religion was the single most important reason why they chose their child's school. Peterson & Campbell, note 13, at 71 (Table 22). For the Washington, D.C., Dayton, San Francisco and San Antonio programs, the numbers were 3.8%, 7%, 19% and 14.9% respectively.[19] Slightly more than half (56%) of parents participating in the private New York School Choice Scholarships Foundation, which provided 1,300 scholarships in 1997 worth up to $1,400 annually for at least three years to children from low-income families, listed religious instruction as a "very important" factor in their choice of school. By contrast, 83% listed teacher quality as very important, and 77% listed academic quality.[20] Thus, the research indicates that

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[19] Wolf, et al., *supra* note 14, at 52 (Table 3); West, et al., *supra* note 14, at 51 (Table 4); Peterson, et al., *supra* note 16, at 35 (Table 2); Paul E. Peterson & David Myers, Mathematica Policy Research and Harvard Univ. PEPG, *An Evaluation of the Horizon Scholarship Program in the Edgewood Independent School District, San Antonio, Texas: The First Year,* at 41 (Table 1.5) (Sep. 1999).

[20] Paul E. Peterson, David Myers & William G. Howell, Mathematica Policy Research and Harvard Univ. PEPG, *An Evaluation of the New York City School Choice Scholarships Program: The First Year,* at 31 (Table 2) (Oct. 1998), available at http://www.ksg.harvard.edu/pepg/papers.htm.

for most voucher parents, something other than a preference for religious instruction is pushing them toward religious schools. That "something" has to do with the realities of the educational marketplace.

1. There are very few seats available in private secular schools

In 1988, Congress commissioned a study to assess whether private schools could be used to alleviate overcrowding in public schools.[21] Researchers with the U.S. Department of Education gathered data from 22 large urban areas about private school enrollment rates, tuition and fees, additional space availability, admissions policies, student characteristics and flows, policies on religious participation, willingness to participate in a transfer program, and likely decisionmakers on participation. *Ibid.*[22] Of the 774,000 students who attended private schools in the study areas, 87% were in religious schools. *Id.* at ix. They also found that 41% of the nonsectarian schools were special emphasis or alternative schools, a factor that further limits choice for those parents who want their children to attend a "regular" school. *Id.* at 32.

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[21] U.S. Dep't of Educ., *Barriers, Benefits, and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools,* at vii (1998) [hereinafter *Barriers, Benefits, and Costs*].

[22] The areas surveyed were: Baltimore City, Buffalo, Chicago, Dade County, Dallas, Detroit, Duval County (FL), El Paso, Houston, Long Beach, Los Angeles, Memphis, Milwaukee, Nashville, New Orleans, New York City, Oakland, Philadelphia, Pittsburgh, Portland (OR), San Antonio and San Diego. *Ibid.*

One significant factor that schools said would limit their participation in any transfer program was the availability of space. Although the researchers found that many of the schools were operating below capacity,[23] religious schools accounted for 85% of the available capacity. Thus of the 150,000 available private school seats in the 22 cities studied, 127,500 were in religious schools. *Id.* at xii.

The Department of Education's findings are generally consistent with those in a 1993 survey by the Southwest Regional Laboratory called *What a Voucher Could Buy: A Survey of California's Private Schools.* The major difference was with respect to capacity. The Southwest Regional Laboratory found that, in 1993 at least, most California private schools were nearly full, although like the 1998 federal survey, the Southwest Regional Laboratory survey found that high-tuition schools had less capacity. One-quarter of such schools were at full capacity, and 75% of them could expand by no more than 15%.[24]

The Southwest Regional Laboratory survey sought to assess the potential impact of Proposition 174, the voucher initiative that appeared on the November, 1993 California ballot. The study found that 84% of religious

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[23] One-third were below 70% capacity, and another third were between 70% and 90% of full capacity. *Id.* at xi. The availability of space was inversely correlated with tuition; of the schools that charged $8,000 or more, 70% were operating near full capacity, whereas only 29% of the schools that charged less than $2,000 were operating close to full capacity. *Ibid.*

[24] Marcella Dianda & Ronald Corwin, Southwest Regional Laboratory, *What a Voucher Could Buy: A Survey of California's Private Schools,* at 3 (Feb. 1993).

schools would accept voucher students, compared to only 62% of nonreligious schools. *Ibid.* The study also indicated that more religious than nonreligious schools would expand in response to the voucher program. *Id.* at 9 & A-12 (Table A-22).

2. Voucher programs steer voucher participants toward religious schools because of cost

In addition to their overwhelming market share, religious schools are far more likely to be within economic reach for voucher recipients than are secular schools. As the federal and Southwest Regional Laboratory studies found, secular schools are more likely to charge higher tuition than religious schools. In the 22 cities studied by the Department of Education, the average nonsectarian school charged $5,888 in 1996-97, whereas the average Catholic school charged $2,406, and other religious schools averaged $3,586.[25] Nonsectarian schools were less likely to offer tuition discounts than were religious schools (56% and 69% respectively), although they gave discounts to somewhat higher percentages of their low-income students than did religious schools (40% of nonsectarian low-income students received discounts, as opposed to 31% of low-income students in Catholic schools and 37% in other religious schools). *Id.* at 41. Of the 40,000 recipients of the Children's Scholarship Fund, 92% of whom attend religious schools, 69% spent less than $2,000 of their own income to augment their scholarship, and 94% spent less than $4,000 of their own funds

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[25] *Barriers, Benefits, and Costs, supra* note 21, at 40.

on tuition.[26] Although only 13% of Children's Scholarship Fund recipients said that cost prevented them from sending their child to the school they preferred, the study of BASIC scholarship recipients in the San Francisco Bay Area revealed that 30% of those who declined scholarships said that they did so because they could not afford the cost of the school.[27]

The relatively modest amount of most voucher payments and the fact that every existing voucher program has some limit on family income inevitably produce an economic incentive to use the voucher at a less expensive school. This is particularly so, because nearly all private schools in the 1998 federal survey reported at least one type of additional cost, with the amount averaging $158 per student.[28] These costs include registration fees (75% of schools), uniforms and books (more than 50%), and fees for instructional and noninstructional activities (about 33%). *Id.* As demonstrated above, because the less expensive private schools are almost all religious, the economic incentives steer voucher recipients toward religious schools.

C. The Ratio of Religious to Secular Private Schools Is Not Likely to Change in Response To a Voucher Program

Critics may argue that it is unrealistic to view the educational marketplace as it currently exists, because the availability of vouchers will encourage entrepreneurs to

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[26] Peterson & Campbell, *supra* note 13, at 5, 43-44.

[27] *Id.* at 42, 72 (Table 23); Peterson, et al., *supra* note 16, at 16, 37 (Table 4).

[28] *Barriers, Benefits, and Costs*, *supra* note 21, at 40.

establish new schools or expand existing ones, many of which could be secular. Experience and the economic realities of private schooling demonstrate that this will not be the case.

The Milwaukee voucher program has been in existence for ten years; during the first seven years of the program, participation was limited to secular schools because of legal challenges.[29] Under these conditions, one would expect the number of secular schools to have grown, particularly during the first seven years of the program, when such schools theoretically had a decided advantage over religious schools in the form of government-subsidized tuition. Such growth was small, however. The program began in 1990-91 with seven private schools; the number slipped to six in 1991-92, then climbed to 11 in 1992-93. *Id.* at 4. It stayed at 12 from 1993-1995, then grew to 17 in 1995-96, 20 in 1996-97, and 23 in 1997-98. *Ibid.*

With the admission of religious schools in 1998-99, the number of schools in the program jumped to 87, and by 2000-01, the number was 103. *Ibid.* The State Department of Public Instruction projected that 107 schools would participate in the program in 2001-02.[30] For the 2001-02 school year, at least 67 of those schools, excluding

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[29] State of Wis., Legislative Fiscal Bureau: *Milwaukee Parental Choice Program* (Informational Paper #29), at 2 (Jan. 2001), available at http://www.legis.state.wi.us/lfb/informationalpapers/2001/29.pdf.

[30] *See* "Milwaukee Parental Choice Program Headcount and FTE, 2001-02 School Year" on Wis. Dep't of Pub. Instruction web site, a document available at http://www.dpi.state.wi.us/dpi/dfm/sms ("Number of Choice Students Enrolled by School in 2001-02").

preschools, are identifiable by name or by NCES as religious schools, and they account for 64.8% of the total number of students enrolled in the program. *Ibid*.

Religious schools will continue to dominate the educational marketplace because they will always have an economic advantage in the form of denominational and volunteer support that secular schools cannot match. The 1998 federal survey found that tuition accounts for 91% of the operating costs at secular private schools, but only 76% of the costs at Catholic schools and 83% of the costs at other religious schools.[31] The report explained that private schools "obtain revenue from parish or congregational subsidies and grants, endowments, and fundraising efforts" and that "[s]chools that are religiously-affiliated or that have relatively low tuitions tend to derive a higher proportion of their revenues from sources other than tuition." *Ibid*. Most religious schools receive donated or subsidized facilities and are staffed at least partially by teaching clergy whose salaries are usually well below market level.[32] In a May, 2000 study, Patrick McEwan of Columbia University reported:

> Estimates from the 1990's, based on a random sample of U.S. Catholic elementary schools, show that the average school receives 28 percent of its revenue from parish subsidies (Kealey, 1996). Besides monetary subsidies, many personnel in private schools are members of religious orders and their salaries understate their

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[31] *Barriers, Benefits, and Costs, supra* note 21, at 43.

[32] Henry M. Levin, *Educational Vouchers: Effectiveness, Choice, and Costs*, JOURNAL OF POLICY ANALYSIS AND MANAGEMENT, Vol. 17, No. 3, 373-92, at 383 (1988).

> true market value. In 1995, for example, 47 percent of Catholic elementary principals were priests or members of a religious community (Kealey, 1996). Their average salary was $20,274 per year, compared with an average salary [of] $34,520 for principals who were laypersons. Nine percent of all private school teachers and a somewhat larger percentage in Catholic schools work on a "contributed services" basis (Chambers and Bobbit, 1996). Salaries of these teachers are an average of 19 percent lower than others in private schools. [Footnote.] Finally, churches may donate use of land and buildings. Bartell's study makes careful estimates of the value of contributed services of physical facilities as well as personnel, finding that cash operating costs of Catholic schools in his sample were between 36 and 45 percent of total resource costs, the rest accounted for by contributed services. [Footnote.][33]

That subsidies such as these provide a significant advantage for religious schools is clear when one considers the costs of establishing and operating a private school. Most secular private schools do not publish data on their revenues and costs, but such data are available

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[33] Patrick J. McEwan, Columbia Univ., Nat'l Center for the Study of Privatization in Educ., *The Potential Impact of Large-Scale Voucher Programs*, at 26 (footnotes omitted) (May 2000). McEwan's report relied on Robert J. Kealey's *Balance Sheet for Catholic Elementary Schools: 1995 Income and Expenses* (1996), published by the National Catholic Educational Association. Dr. Kealey's report for 1999 income and expenses states that 85% of Catholic elementary schools received a parish subsidy during 1998-99 and that 48.3% of the schools relied on the subsidy for more than 20% of their income. R. Kealey, *Balance Sheet for Catholic Elementary Schools: 1999 Income and Expenses*, at 14 (2000).

for Edison Schools, Inc., a publicly traded, for-profit company that runs 113 public schools nationwide, with a combined enrollment of 57,000 students.[34] Edison has incurred net losses every year since it opened in 1996, and it expects losses to continue into the future. *Id.* at 30. Its loss for 2001 was $38.1 million. *Ibid.* Edison reports total revenue per student of $6,593 with a net loss per student of $668, for total expenditures per student of $7,261. *Id.* at 27. It reported pre-opening expenses for administrative and personnel costs associated with opening new schools or expanding existing sites of $8.6 million to accommodate 19,500 new students, or $441 per student. *Id.* at 29-30, 33. Edison reports the cost of constructing a new school as between $4 million and $8 million. *Id.* at 43.

Even a $5,000 voucher would fall far short of meeting expenses like these. Only the Milwaukee voucher program provides such an amount,[35] and as discussed above, it has not been sufficient to produce any significant increase in the supply of seats at secular private schools. Most vouchers, however, are less than half that amount.[36]

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[34] Edison Schools, Inc., *2001 Annual Report* (2001), available at http://media.corporate-ir.net/media___files/NSD/edsn/reports/edsn___ar___01.pdf.

[35] State of Wis., *supra* note 29, at 6.

[36] The Cleveland voucher is a maximum of $2,500 per student. Ohio Rev. Code Ann. § 3313.978(C)(1) (Anderson 1999 & Supp. 2000). The Florida voucher program appears to pay full tuition, but is dependent upon whether the student's public school has received a failing grade for two years. The lack of certainty about the availability of vouchers in a particular area would discourage entry into the Florida private school market. The November 2000 voucher initiative on the California ballot would have provided a $4,000 voucher, and the voucher initiative that was also defeated 2-1 in Michigan in the same month would have provided a $3,300 voucher. *See Voucher Initiatives Defeated in Calif., Mich.*, Education Week (November 15, 2000).

Vouchers available through private voucher programs are generally small. Children's Scholarship Fund vouchers are limited to 50% or 75% of private school tuition, depending on family income. Peterson & Campbell, *supra* note 13, at 11. BASIC Fund vouchers in the San Francisco Bay Area were a maximum of $1,500 in 1999. Peterson, et al., *supra* note 16, at 5. Washington Fund Scholarships in Washington, D.C. were a maximum of $1,700 in 1997. Wolf, et al., *supra* note 14, at 5. PACE Scholarship Program vouchers in Dayton, Ohio were a maximum of $1,200 for elementary students and $2,400 for high school students in 1998-99. West, et al., *supra* note 14, at 9.

Without the subsidies and below-market salaries that religious schools enjoy, secular schools are unlikely to enter the private school market in response to a large-scale voucher program.

CONCLUSION

When government pays for a function that is both essential to a society and overwhelmingly characterized by speech, government endorsement of that speech becomes impossible to avoid. The taxpayer whose funds are being used to pay for religious education is as aware of the connection as the parents who benefit from the use of those funds. Unlike the parents, the taxpayer's wishes are not consulted, and he cannot opt out of the program. Compulsion such as this is indistinguishable from "the general assessments in support of religion that lie at the core of the prohibition against religious funding," and equally violative of the First Amendment. *See Rosenberger*

v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 851 (1995) (O'Connor, J., concurring) (importance of possibility of opting out).

Whether the average observer approves or disapproves of government endorsement is not the issue. It is the existence of the endorsement, here coupled with religious indoctrination at state expense, that violates the Constitution. That endorsement is clear when a program deliberately directs schoolchildren into an educational market that is overwhelmingly religious.

Respectfully submitted,

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